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TESTIMONY BEFORE THE SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY OF THE COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES

AT A LEGISLATIVE HEARING ON H.R. 3179, THE "ANTI-TERRORISM INTELLIGENCE TOOLS IMPROVEMENT ACT OF 2003"

SUBMITTED BY
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Chairman Coble, Ranking Member Scott, and distinguished subcommittee members, thank you for inviting me to testify on H.R. 3179, the "Anti-Terrorism Intelligence Tools Improvement Act of 2003," which expands federal secret surveillance powers under the USA PATRIOT Act.

Until January of 2003, I had the honor to serve with many of you as a United States Representative from Georgia. Previously, I served as the presidentially appointed United States Attorney for the Northern District of Georgia, as an official with the U.S. Central Intelligence Agency, and as an attorney in private practice. Currently again a practicing attorney, I now occupy the 21st Century Liberties Chair for Privacy and Freedom at the American Conservative Union (ACU) and in that capacity I am pleased to be speaking on behalf of the American Conservative Union today. I also consult on privacy matters for the American Civil Liberties Union.

As a student and supporter of the Constitution and its component Bill of Rights, I will not concede that meeting this government's profound responsibility for national security entails sacrificing the Rights given us

by God and guaranteed in that great document. Yet, unfortunately, the road down which our nation has been traveling these past two years, with the USA PATRIOT Act, is taking us in a direction in which our liberties *are* being diminished in that battle against terrorism.

Despite the broad concerns expressed by many grassroots conservative organizations, such as the American Conservative Union, Free Congress Foundation, and Eagle Forum – with whom I continue to work closely – the Administration has pressed on with a ill-considered proposal to prematurely make permanent all of the USA PATRIOT Act. I respectfully submit this would be a serious mistake. Along with many of you, I balked at making the PATRIOT Act's new powers permanent, insisting on a "sunset clause" that would allow Congress to review these new powers. Making those powers permanent now would take away any leverage Congress now has to secure cooperation from the Justice Department in its oversight efforts.

The Administration has also attempted to push forward, on a piecemeal basis, parts of the "Son of PATRIOT" proposal that surfaced last year. H.R. 3179 includes several of the provisions of the Justice Department's draft "Son of PATRIOT" bill,[1] and the Administration is pushing other bills separately that include other provisions.[2] Passing *pieces* of "Son of PATRIOT" this year would be a mistake.

The House Judiciary Committee has yet to convene a series of long-planned hearings to examine how the USA PATRIOT Act is being used. Are its provisions being used widely, in ordinary cases having nothing to do with terrorism? The Attorney General has said he hasn't used some powers. If so, are such powers really needed? These are just a few of the questions that the Justice Department has not adequately answered. While I have faith the Chairman will hold these promised hearings, these

[1] The "Domestic Security Enhancement Act of 2003" (DSEA) was leaked early last year. Although never introduced, several of its sections are contained in H.R. 3179. Sections 2 and 3 of H.R. 3179 are identical to section 129 of DSEA. Section 4 of H.R. 3179 is a modified version of section 101 of DSEA (section 101 of DSEA would have eliminated the "foreign power" standard for citizens as well as non-citizens). Section 5 of H.R. 3179 is identical to section 204 of DSEA. Section 6 of H.R. 3179 appears to be new.

[2] These include H.R. 3037, "The Antiterrorism Tools Enhancement Act of 2003," (administrative subpoenas); H.R. 3040 and S. 1606, "The Pretrial Detention and Lifetime Supervision of Terrorists Act of 2003," (presumptive denial of bail); and H.R. 2934 and S. 1604, the "Terrorist Penalties Enhancement Act of 2003" (new death penalties).

questions should be examined *before* the Committee considers new legislation.

The question before us today is whether the USA PATRIOT Act should be expanded this year. In short, the answer is NO. Put simply, Congress should not provide more powers to an ever-growing federal government without carefully and exhaustively reviewing how it is using the powers it already has.

The Fourth Amendment is clear: "The right of the *people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon *probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" (emphasis added).

Note carefully – "people," not "citizens." The Founding Fathers meant what they wrote. Conservatives do not believe that, more than two hundred years later, we should creatively "interpret" the Bill of Rights when the words don't suit our transitory notions of what is convenient. While the Constitution does reserve some rights exclusively to American citizens, the Founders protected certain fundamental rights for all people, including the right to due process of law and the right to be free from searches – a word broad enough to include the 18th and 19th Century physical variety, the 20th Century telephone variety, and the 21st Century Internet variety – not based on probable cause.

At bottom, the problem with the surveillance powers of the USA PATRIOT Act is that they play fast and loose with clear constitutional commands. Unfortunately, H.R. 3179 takes certain provisions of the USA PATRIOT Act that weaken the Fourth Amendment and other fundamental rights and makes them worse.

Creating New Criminal Penalties for Secret FBI Letter Demands for Confidential Records

Sections 2 and 3 of H.R. 3179 add new criminal penalties to enforce a far-reaching and troubling power of the FBI – the power to demand, without a court order, that a business or individual release a broad range of highly confidential records. The records demands are secret and the recipient is barred from informing anyone that the demand has been

made or that records have been turned over. Section 505 of the USA PATRIOT Act amended the so-called "national security letter" power to eliminate the need to assert any individual suspicion (much less probable cause) before issuing such a letter. Section 2 of the bill adds a new crime to enforce the gag provisions. Section 3 allows the FBI to invoke a court's aid in enforcing the letter demands – and punish any failure to comply as contempt.

The records subject to these FBI letters include the customer records of "communications service providers" – such as an Internet Service Provider, telephone company, or (according to the FBI) the records of your use of a computer terminal at the local library or Internet cafe. They also include credit reports and the customer records of "financial institutions." The term "financial institutions" was expanded and redefined by last year's intelligence authorization act to include a host of large and small businesses, including casinos, the local jewelry store, post office, car dealership and pawnbroker's store; as well as any other business the Treasury Secretary sees fit to designate.[3]

The government does not need these records powers, also known as "administrative subpoenas" or "national security letters," to obtain records of suspected terrorists. An ordinary search warrant or grand jury subpoena can be used in the investigation of any crime, including one alleging terrorism. National security letters are used in potentially wide-ranging "foreign intelligence" investigations. These records demands can be used without even the minimal oversight of the secret Foreign Intelligence Surveillance Court or any other court.

There is no right to challenge the scope of a national security letter, and – because it was repealed by the USA PATRIOT Act – no standard for protecting individual privacy. Compliance with a national security letter – and compliance with the gag provision that muzzles a recipient from protesting such a letter – is mandatory under the law, although no specific penalties are listed.

Specific penalties aren't needed for national security letters to serve their intended function of giving cover to businesses and or individuals to cooperate with wide-ranging government intelligence investigations.

[3] Intelligence Authorization Act for FY2004, Pub. L. No. 108-177, at § 374 (providing that definition of "financial institution" at 31 U.S.C. § 5312(a)(2) applies for national security letters).

The recipient can point to a legally-binding national security letter in response to any complaints from customers about turning over their confidential information to the government.

Without specific penalties, the business or individual who receives a letter still has some, albeit very limited, leverage to try to persuade the government to narrow an exceedingly broad or intrusive request. Adding *criminal penalties* to such letters for the first time – and to the gag provision that prevents a recipient from complaining about them – tips the balance decisively in the government's favor and away from the business or individual whose records are being demanded.

Before Congress considers adding criminal penalties to this troubling power – which has already been expanded twice since 9/11 – it should hold hearings to find out much more about how these letters work in practice. The government has refused to release even the most general information about national security letters – including the type of records being monitored and whether the government is seeking to obtain entire databases.

At a minimum, Congress should make explicit the right of a recipient to challenge a national security letter – just as a recipient can challenge a grand jury subpoena. Congress should require some individual suspicion before compliance with a national security letter can be ordered by a court. Finally, the recipient should be able to challenge the gag provision in court, and should be allowed to contact an attorney, congressional committee, or the Justice Department Inspector General without fear of being prosecuted for violating the gag provision.

Allowing Secret Government Eavesdropping Without Any Connection to Foreign Government or Terrorist Group

Section 4 of H.R. 3179, the so-called "lone wolf" provision, would eliminate the "foreign power" standard for one type of surveillance: non-citizens suspected of involvement in terrorism. The "foreign power" standard serves as a vital protection against overzealous use of the government's "national security" power to wiretap, and otherwise secretly monitor, private communications outside the standards of criminal investigations.

As I discussed earlier, the Fourth Amendment is clear – no searches without a warrant based on probable cause. Yet despite that clear command, the Executive Branch has long claimed an unwritten "national security" exception to the Fourth Amendment that allows secret domestic surveillance for foreign intelligence and counterintelligence outside criminal probable cause standards.

The carefully-crafted, *compromise* law that keeps this exception within reasonable bounds is the Foreign Intelligence Surveillance Act (FISA). The law permits secret surveillance outside normal criminal bounds when approved by the Foreign Intelligence Surveillance Court. The government can appeal any denials (which are exceedingly rare) to another secret court – the Foreign Intelligence Surveillance Court of Review.

One of the most important limitations on FISA surveillance – the requirement that FISA surveillance is only allowed when foreign intelligence is "*the* purpose" of the surveillance – has already been substantially weakened by the USA PATRIOT Act, which allows such surveillance when foreign intelligence is merely "a significant purpose."

The Foreign Intelligence Surveillance Court of Review, in its first-ever case, approved this change against a constitutional challenge mainly because the "foreign power" standard remains.[4] Although FISA surveillance may now be used even where the government's main purpose is other than foreign intelligence, the government must still show probable cause that the target of FISA surveillance is a "foreign power or agent of a foreign power." The Court of Review, in line with other courts that have looked at the issue, made clear that the required connection to a "foreign power" – and therefore to the President's national security powers – is a major reason why a separate, secret scheme of surveillance – outside the normal bounds of criminal investigation – is constitutional.

The so-called "lone wolf" provision *eliminates* this "foreign power" standard for wiretapping and other secret surveillance for non-citizens suspected of involvement in international terrorism. Notwithstanding its limitation to non-citizens, the provision violates the Fourth Amendment because the Fourth Amendment protects "people," not citizens.

[4] *In re Sealed Case*, 310 F.3d 717 (For. Intel. Sur. Ct. Rev. 2002).

Certainly we can expect that the next request will be to expand this power to citizens, as originally proposed in "Son of PATRIOT." Ultimately, this provision sets a dangerous precedent for all Americans, because it severs secret national security surveillance from its constitutional moorings – the President's constitutional responsibility to defend the nation against foreign powers.

Supporters wrongly call this unconstitutional, unwise and unprecedented provision the "Moussaoui fix." They say it is needed because the government failed to seek a FISA warrant, before 9/11, to search suspected hijacker Zacarias Moussaoui and that, with this "lone wolf" provision, they might have done so.

In fact, this provision is not the "Moussaoui fix." FBI agents did not seek a FISA warrant because – even though Moussaoui was connected to a foreign rebel group – national security bureaucrats said FISA could not be used because the rebel group was not a "recognized" foreign power. They were wrong. Congress' own investigation of the pre-9/11 intelligence problems found those government officials "misunderstood the legal standard for obtaining an order under FISA." The "foreign power" standard requires only that the government show probable cause that the person is an agent for some foreign government, foreign political faction or organization, or group involved in international terrorism – which can be as few as two individuals. A group involved in international terrorism need not be formally designated as a foreign terrorist organization (as these officials mistakenly believed) to be a "foreign power" under FISA. Whether the foreign power is "recognized" is legally both irrelevant and meaningless.

Finally, the investigation found that FBI agents were so quick to leap to FISA in the case of Zacarias Moussaoui, they did not fully consider getting a plain vanilla criminal search warrant. Insofar as these problems involved a misunderstanding of existing federal power, *not* a lack of power, Congress' investigation recommended greater legal training for national security officials.[5]

How, then, should we monitor terrorists who may be acting alone? The answer is simple – with ordinary search warrants and wiretaps, based on

[5] Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, Report of the U.S. Senate Select Comm. on Intelligence and the U.S. House Permanent Select Comm. on Intelligence 321-323 (December 2002).

probable cause. Criminal warrants and wiretaps have long been available for federal crimes, including terrorism. Rather than distorting foreign intelligence surveillance, the government should use the tried-and-true methods of regular criminal warrants and court orders.

Indeed, while this proposal has been pending in Congress for more than two years, the Justice Department has been unable to explain why criminal powers are not sufficient to deal with individual terrorists. In a February 2003 report on FISA oversight, Senators Leahy, Grassley and Specter said that the Justice Department was unable to provide even a single case, even in a classified setting, that explained why the "lone wolf" provision was necessary. As they said, "In short, DOJ sought more power but was either unwilling or unable to provide an example as to why."

If Congress is determined to go forward with an unnecessary "lone wolf" provision, it should at least adopt a provision that gives the Foreign Intelligence Surveillance Court some discretion to deny a wiretap request where the evidence clearly shows there is no connection to any foreign threat. For example, as Senator Feinstein has proposed, Congress could establish a presumption that a non-citizen is connected to a foreign power based on evidence of involvement in international terrorism.

Expanding the Power to Use Secret Evidence and Secret Surveillance Information In Criminal and Immigration Cases

Finally, sections 5 and 6 of H.R. 3179 also tip the balance towards the government, and away from the individual, when the government seeks to use secret evidence – classified information – against an individual in legal proceedings *without* revealing the information to the accused.

Section 5 takes away some of the judge's discretion in handling classified information in criminal proceedings under the Classified Information Procedures Act (CIPA). It requires a federal judge to hear a government request to delete classified information from documents made available to the defendant during discovery proceedings *in camera* and *ex parte* – that is, in secret without hearing from the other side. It also allows the government to make this request orally, rather than in writing. While it still permits the judge to deny the government request to delete classified information, or to order a more complete summary, it nevertheless

represents an incremental shift of power away from the court and towards the prosecutor. Congress should hear much more from both prosecutors and defense lawyers with experience in this area before making such a change, in order to determine whether the effect may be much larger than intended.

Section 6 of the bill is a major shift *in favor* of greater use of secret information in immigration proceedings. Section 6 amends the Foreign Intelligence Surveillance Act (FISA) to permit the government secretly to use FISA-derived information in immigration cases. Section 6 would amend FISA to eliminate very important safeguards that are designed to ensure that when secret foreign intelligence wiretaps and other surveillance are used to put a person's liberty in jeopardy, he has notice and an opportunity to challenge whether the surveillance was lawful. Under this change, however, a person could face lengthy detention, and ultimately deportation, without *ever* knowing about the government's use of secret surveillance information or having the ability to challenge it.

Mr. Chairman, this issue is, as many of you know, dear to my heart. I firmly believe it is simply un-American for our government to withhold critical information from an individual whose liberty is in jeopardy. Star chamber proceedings have been the hallmark of totalitarian governments, not our own. As a result, when I served in this illustrious body and on this Committee, I worked across party lines to author the "Secret Evidence Repeal Act" (H.R. 1266 in the 107th Congress), which would have ensured that individuals in immigration proceedings had the same access to a summary of classified information as those in criminal proceedings. My bill attracted the support of over 100 cosponsors and after two hearings passed this Committee with a vote of 26-2 in favor of my substitute.[6] Unfortunately, however, the Secret Evidence Repeal Act was not passed by the full House and is not, as a result, the law of the land. While I am certainly gratified that President Bush has pledged publicly not to allow classified information in immigration proceedings, the government still claims the power to do so and a future Administration is free to reverse that policy, as is this one.

The passage of section 6 of H.R. 3179 would seriously undermine this Committee's efforts to reform the use of classified information in

[6] H.R. Rep. No. 106-981, Secret Evidence Repeal Act of 2000, 106th Cong., 2nd Sess. (Oct. 18, 2000). The bill, as amended, passed on a voice vote. Three members filed dissenting views.

immigration proceedings. Put simply, section 6 goes beyond allowing the use of secret evidence. It allows the *secret use* of secret surveillance information. Not only would the defendant have no right to see the classified information, derived from FISA surveillance, that is being used against him in the immigration case, he would not even have the right to be notified that such information was going to be used, and obviously would have no ability to challenge it.

Amending FISA to allow the *secret use* of such secret surveillance information in immigration cases is an idea that simply flies in the face of the House Judiciary Committee's commendable efforts to reform the use of classified information and end the use of secret evidence.

There is also some dispute about whether the amendment would really affect only immigration proceedings, or would affect a wide range of civil proceedings, including asset forfeiture, tax, and regulatory proceedings. I understand the drafters intended to limit the amendment to immigration proceedings. However, even with a clarification, I caution you that allowing the *secret use* of secret surveillance in one type of civil case – in this case, immigration proceedings – can *and will* be used as a precedent when the Justice Department comes back to you and asks for this exception in other types of civil cases.

Conclusion

As a former CIA official and federal prosecutor, I witnessed first-hand how much of our national security apparatus -- even our counter-terrorism and international intelligence work -- is built on very basic policing methods. From your local grifters to the Bin Ladens of the world, bad guys are generally found and punished using a system that includes basic checks and balances on government power and which militates against dragnet investigative fishing expeditions.

In many other countries, it is neither acceptable nor lawful to reflect openly on and refine past action. In America, it is not only allowable, it is our *obligation*, to go back and reexamine the decisions made by the federal government during the panic of an event like September 11th.

Of course, a country suffering through the immediate fallout from the worst terrorist attack on American soil ever is going to make some

mistakes. To err isn't just human, it's a direct result of representative democracy.

Case in point: myself. I voted for the USA PATRIOT Act. I did so with the understanding the Justice Department would use it as a limited, if extraordinary power, needed to meet a specific, extraordinary threat. Little did I, or many of my colleagues, know it would shortly be used in contexts other than terrorism, and in conjunction with a wide array of other, new and privacy-invasive programs and activities.

According to a growing number of reports, as well as a GAO survey, the Justice Department is actively seeking to permit USA PATRIOT Act-aided investigations and prosecutions in cases wholly unrelated to national security, let alone terrorism.

This should not be allowed to continue. As my esteemed colleague in the House, former Speaker Newt Gingrich wrote recently, "in no case should prosecutors of domestic crimes seek to use tools intended for national security purposes." When we voted for the bill, we did so only because we understood it to be essential to protect Americans from additional, impending terrorist attacks, not as tools to be employed in garden-variety domestic criminal investigations.

With conservatives expressing these serious doubts about the reach of the USA PATRIOT Act, it is time to go back and review the law, hold oversight hearings and consider corrections. It is certainly not the time to consider making it permanent or expanding it.

Conservative or liberal, Republican or Democrat, all Americans should stand behind the Constitution; for it is the one thing – when all is said and done – that will keep us a free people and a signal light of true liberty for the world. Thank you again for allowing me to testify.